

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

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**Appeal No. 2017 AP 000724 CR
Fond du Lac County Circuit Court Case Nos. 2015CT000064**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SARAH A. SCHMIDT,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT DENYING THE DEFENDANT-APPELLANT
MOTION FOR SUPPRSSION OF EVIDENCE, IN FOND
DU LAC COUNTY, THE HONORABLE DALE L.
ENGLISH, JUDGE, PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT SARAH A. SCHMIDT**

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STATEMENT OF THE ISSUES

Did Fond du Lac County Sheriff Deputy Paul Metzger have the requisite level of probable cause to arrest Ms. Schmidt for operating a motor vehicle while under the influence of an intoxicant?

The trial court answered: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Sarah A. Schmidt (Ms. Schmidt) was charged in the County of Fond du Lac, with having operated a motor vehicle while under the influence of an intoxicant contrary to Wis. Stat. §346.63(1)(a) and with operated a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat §346.63(1)(b). On June 26, 2015, Ms. Schmidt, by counsel, filed a motion for suppression of evidence alleging a lack of probable cause to arrest. A hearing on said motion was held on February 23, 2016, the Honorable Dale L. English, presiding. The court denied said motion, and a written order was entered on April 17, 2017. (R28:1/ App. 1). A jury trial was held on February 7, 2017. The jury found Ms. Schmidt not guilty of operating a motor vehicle while under the influence of an intoxicant, but found her guilty of operating a motor vehicle with a prohibited alcohol concentration.

On February 23, 2017, the defendant timely filed a Notice of Intent to Pursue Post Conviction relief, and on April 18, 2017 timely filed a Notice of Appeal.

Facts in support of this appeal were adduced at the motion hearing held on February 17, 2016 and were introduced through the testimony of Fond du Lac County Sheriff Deputy

Paul Metzger. Metzger testified that on January 28, 2015 at approximately 2:27 a.m., he was in the city of Fond du Lac on Highway 45. At that time, he observed a vehicle, later determined to be driven by Ms. Schmidt traveling in front of him. (R.32:5/ App. 2). Metzger followed the vehicle for several miles (R.32:21/ App. 15). While Metzger testified that he observed the vehicle moving back and forth within its lane, and varying speeds (R.32:5-9/ App. 2-6), he acknowledged that the only traffic law violation that he observed was the vehicle traveling 35 miles per hour in a 30 miles per hour zone. (R.32:22/ App. 16). At no point did Ms. Schmidt's vehicle cross the center line or cross the fog line. (R.32:21/ App. 15). Shortly after observing the speeding violation, Officer Metzger stopped Ms. Schmidt's vehicle. Ms. Schmidt responded properly to the officer's lights, and pulled to the side of the road. Metzger acknowledged that nothing about the way that Ms. Schmidt responded to the lights and pulled over led him to suspect impairment. (R.32:23/ App. 17).

Upon contact with Ms. Schmidt, Metzger observed her speech to be normal (R.32:20/ App. 14), and no problems with her motor coordination that suggested impairment. (R.32:23/ App. 17). However, in speaking with Ms. Schimdt, Metzger

noticed her eyes were red and glassy, and that there was an odor of intoxicant coming from the vehicle. (R.32:9/ App. 21). Additionally, Ms. Schmidt's voice was visibly shaking and cracking when she spoke (R.32:10/ App. 7). At times Ms. Schmidt would pause for a long period of time before answering Metzger's questions. However, she admitted consuming three tap beers between 7:30 p.m. and 11:30 p.m. (R.32:11/ App. 8).

Metzger ordered Ms. Schmidt from the vehicle to perform field sobriety testing. (R.32:13/ App. 10). The temperature was cold outside. Ms. Schmidt was shivering throughout the contact. (R.32:12/ App. 9). Ms. Schmidt requested to speak with a lawyer, and Metzger informed her she did not yet have that right. Eventually, Mr. Schmidt exited the vehicle for field sobriety testing. Metzger performed the horizontal gaze nystagmus test (HGN) and observed six of six clues. Metzger testified that based on the HGN test, he felt Ms. Schmidt was impaired. However, he conceded that Ms. Schmidt had no balance problems on the HGN test. (R.32:26/ App. 19).

According to Metzger, because of the cold temperature, he asked Ms. Schmidt to travel to the sheriff department to perform the remaining field sobriety tests. (R.32:15/ App. 11). Ms. Schmidt indicated that she would perform the tests at the

location of the stop, and did not want to be transported to the sheriff department for testing. (R.32:24/ App. 18). Metzger did not allow Ms. Schmidt to perform the tests at the scene. *Id.* After refusing to be transported to the sheriff department for field sobriety testing, Metzger asked Ms. Schmidt to perform a preliminary breath test Ms. Schmidt continued to ask to speak to a lawyer and did not provide a breath sample. (R.32:18-19/ App. 12-13).

Metzger then arrested Ms. Schmidt for operating a motor vehicle while impaired. (R.32:19/ App. 13).

Defense counsel argued that based on the facts adduced at the motion hearing, Metzger did not have the requisite level of probable cause to arrest Ms. Schmidt. (R.32:28-29/ App. 20-21). The court did not consider Ms. Schmidt's refusal to be transported to the sheriff department for field sobriety testing as consciousness of guilty. However, the Court found that Metzger had probable cause to arrest Ms. Schmidt. (R.32:35/ App. 24). An Order denying Ms. Schmidt's motion was filed on April 17, 2017. A jury trial was held on February 7, 2017. Ms. Schmidt timely filed a Notice of Appeal on April 17, 2017.

STANDARD OF REVIEW

When reviewing the circuit court's denial of a motion to suppress on probable cause grounds, the appellate court will uphold the lower court's finding of facts unless they are clearly erroneous, but independently reviews application of those facts to constitutional principles, as questions of law. *State v. Blatterman*, 2015 WI 46, 362 Wis.2d 138, 864 N.W.2d 26.

ARGUMENT

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution, protect individuals against unreasonable seizures. “A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment...” *State v. Sykes*, 2005 WI 48, ¶14, 279 Wis.2d 742, 695 N.W.2d 277 citing to *State v. Fry*, 131 Wis.2d 153, 169, 388 N.W.2d 565 (1986). Probable cause “exists where the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe ...that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986). Probable cause requires that at the moment of arrest, an officer knew of facts and circumstances that were

sufficient to warrant a prudent person to believe that the person arrested had committed or was committing an offense. *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 189, 366 N.W. 2d 506 (Ct. App 1985). A reasonable police officer need only believe that guilt is more than a possibility. *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). The State must adduce sufficient evidence to show that the evidence known to the arresting officer at the time of the arrest would lead a reasonable officer to believe that the defendant was probably guilty of operating a motor vehicle while impaired. *State v. Lange*, 2009 WI 49, ¶38, 317 Wis.2d383, 766 N.W.2d 551. Probable cause is determined on a case by case basis using the totality of the circumstances. *State v. Kasian*, 207 Wis.2d 611, 621-22, 558 N.W.2d 687 (Ct.App. 1996)

In its ruling, the trial court opined that not every potential indicator of impairment is necessary to support probable cause to arrest. The trial court comparing Ms. Schmidt's case to *Lange* found that in *Lange* the defense attorney "pointed out everything that wasn't there in that case." (R.32:32/ App.22). It is true that the *Lange* court found probable cause to arrest even though, as here, there were several indicators of impairment lacking.

However, *Lange* stands for the proposition that in certain cases, even if many indicia of impairment are lacking, driving behavior alone might play a significant role in the probable cause determination. In *Lange*, the court found that the observed driving was so “wildly dangerous”, that it alone suggested “the absence of a sober driver” behind the wheel. *Lange* at ¶24. The defendant in *Lange* “crossed the center line multiple times, venturing far into the wrong side of a four-lane road. The defendant also did not merely speed; he increased his speed to over eighty miles per hour in a thirty miles per hour zone...the defendant did not simply fail to maintain proper control of his vehicle; he drove his vehicle off the road and through a utility pole.” *Id.* The driving behavior of Lange played a significant role in the court’s probable cause determination.

Likewise, in *In re Smith*, 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243, the defendant in arguing that probable cause to arrest did not exist “contended that no evidence existed of slurred speech, difficulty standing, bloodshot eyes or other indicia of intoxication.” *Id.* at ¶17. Once again, even though several indicia of intoxication were absent, the court found that probable cause existed for the arrest. Clearly, the defendant’s driving behavior played a significant role in the decision. In

finding probable cause for arrest, the *Smith* court pointed to the facts that, “at the time of the arrest, the Deputy knew that the defendant had been driving well in excess of the speed limit late at night on a two-lane highway; that the defendant delayed pulling over after the deputy activated his emergency lights; [and] that the defendant had twice driven across the centerline before pulling over...” *In re Smith* at ¶36

Ms. Schmidt’s case is easily distinguishable from *Lange* and *In re Smith* inasmuch as here, the driving would not have led a reasonable officer to suspect impairment. Deputy Metzger followed Ms. Schmidt for several miles. In that time, by his own admission, the only traffic law violation observed was that Ms. Schmidt was traveling five miles per hour over the speed limit; thirty-five miles per hour in a thirty-mile per hour zone. Furthermore, while he testified that Ms. Schmidt’s vehicle moved within her lane, obviously, he did not think the driving was problematic, considering he followed her for several miles, and only stopped her once he observed the minor speed violation. Weaving within a lane does not even rise to the level of reasonable suspicion to stop a vehicle. *State v. Post*, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634. Thus, Ms. Schmidt’s driving behavior did not suggest impairment.

Furthermore, the observations made subsequent to the stop did not provide Deputy Metzger with sufficient additional indicia amounting to probable cause to arrest. Metzger conceded that the odor of intoxicant doesn't suggest impairment, rather it only shows consumption. (R.32:20/ App. 14). Metzger observed Ms. Schmidt's speech and motor coordination to be normal. (R.32:20,23/ App. 14,17). Deputy Metzger provided no testimony that Ms. Schmidt's gait or balance seemed impaired, acknowledging that Schmidt had no balance problems on the HGN test. (R.32:26/ App. 19). Furthermore, despite Ms. Schmidt wanting to perform the field sobriety tests at the scene, Metzger considered her to have refused the test because she did not want to be transported to the Sheriff Department for testing. The court did not consider Ms. Schmidt's refusal to be transported for field sobriety testing in its probable cause determination. (R.32:34/ App. 18). (Refusal to perform field sobriety tests could show a consciousness of guilt and thus can be used in the probable cause determination. *State v. Babbitt*, 182 Wis.2d 349, 525 N.W.2d 102 (Ct. App. 1994).

Thus, the lack of impaired driving along with the additional observations made by Deputy Metzger after stopping Ms. Schmidt, did not rise to the requisite level of probable cause

to believe that Ms. Schmidt was operating her motor vehicle while impaired.

CONCLUSION

Because of the above, the trial court erred in finding that Deputy Metzger had probable cause to arrest Ms. Schmidt. The Court should reverse the order and vacate the judgement of conviction.

Dated this 11th day of July, 2017.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 19 pages. The word count is 3559.

Dated this 11th day of July, 2017.

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**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of July, 2017.

Respectfully submitted,

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 11th day of May, 2017.

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APPENDIX